



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Litton Applied Technology

File: B-227090; B-227156

Date: September 3, 1987

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### DIGEST

1. Protest that agency wrongfully disclosed technical data proprietary to protester is denied where, under the terms of the Defense Acquisition Regulation (DAR), the agency purchased unlimited rights in the disputed technical data. General Accounting Office construes the language of the DAR to permit the agency to use this data in any manner whatsoever. Thus, the agency's use of this data in its current acquisition of this item was proper.

2. Protester has not proven its case when the only evidence on an issue of fact is conflicting statements of the agency and the protester.

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### DECISION

Litton Applied Technology, a Division of Itek Corporation, a subsidiary of Litton Systems, Inc. (ATD), protests any award under requests for proposals (RFPs) Nos. F09603-87-R-3607 (protest B-227090) and F09603-87-R-9044 (protest B-227156). ATD alleges that proprietary manufacturing information it previously furnished the government was improperly incorporated by reference in the RFPs and that use of this information in this manner was not authorized by ATD.

For the reasons that follow, we deny the protests.

Through these solicitations, the United States Air Force, Warner Robins Air Logistics Center (WRALC), sought offers for the supply of primary control indicators (protest B-227090) and auxiliary control indicator (protest B-227156) for use in the F-16 aircraft. The record indicates that the primary control indicator (P/N: 31-054233-01) and the auxiliary control indicator (P/N: 31-054234-01) were originally designed as one control indicator (P/N: 31-054236-01). However, due to space limitations in the

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aircraft, the control indicator was divided into two units, primary and auxiliary.<sup>1/</sup>

The specifications of RFP -3607 advised offerors that the primary control indicators were to be built in accordance with a technical data package which included AFLC/AFSC Form 2, an acquisition and supplemental data sheet. Various drawings, engineering and associated lists were listed on AFLC/AFSC Form 2, including drawing (DWG) 23-055281 and wire list (WL) 31-054233. Although DWG 23-055281 was referenced, it was not required as per Note 1 of AFLC/AFSC Form 2; instead, offerors were instructed to use pages 7-5, 7-6 and foldout-1 (FO-1) of Technical Order (T.O.) 12P3-2ALR-22 in lieu thereof.

ATD filed its protest with our Office on May 1, 1987, approximately 2 hours before proposals were due. Award under the RFP is being delayed pending our decision.

ATD protests that WRALC wrongfully disclosed proprietary data contained in a maintenance manual, T.O. 12P3-2ALR-22, in the current solicitation. ATD explains that this T.O. contains a wire list and schematic drawing that "are identical to WL31-054233 23-055281" which it had previously delivered to the agency with limited use rights. Since ATD did not authorize use of its proprietary data, ATD contends that WRALC's actions in this regard constitute improper disclosure of data furnished with a limited rights legend.

The protester further contends that the T.O. was furnished on the basis that its use would be limited to installation, operation, maintenance or training purposes. Therefore, where as here, the agency has used the T.O. for procurement purposes, the protester argues that such use was improper and violates applicable procurement regulations. ATD requests that we find the use of T.O. data for other than maintenance or repair purposes was improper.

In its report on the protest, the agency denies that it wrongfully disclosed data proprietary to ATD in this solicitation and advances several reasons why its use of

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<sup>1/</sup> Protests B-227090 and B-227156 were filed with our Office 3 weeks apart. The submissions of the protester and the contracting agency in the two protests are virtually identical and the parties agree that the issues presented are the same. Although this decision discusses the earlier-filed protest concerning RFP No. -3607 in terms of the specific Technical Order pages and drawing numbers unique to it, our decision is also dispositive of the later-filed parallel protest concerning RFP -9044.

T.O. and wire list data was proper. In this regard, WRALC initially points out that the referenced T.O. pages were not included in the solicitation package; but it concedes that the data will be made available to the awardee.

According to WRALC, the T.O. had been previously delivered by ATD as a contract line item under contract No. F09603-77-C-3322. That contract contained the rights in Data and Computer Software clause prescribed by the Defense Acquisition Regulation (DAR), § 7-104.9, Defense Acquisition Circular No. 76-27, May 15, 1981. This clause provides, in pertinent part, that the government shall have unlimited rights in:

"manuals or instructional materials prepared or required to be delivered under this contract or any subcontract hereunder for installation, operation, maintenance or training purposes."

See DAR § 7-104.9(b)(i)(vii). The clause defines "unlimited rights" as the right to:

"use, duplicate, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so."

See DAR § 7-104.9(a)(7). Accordingly, WRALC argues that under its interpretation of this clause in contract -3322, ATD was required to furnish the T.O. data without any restrictions whatsoever on its use; thus, ATD's claim that the agency was precluded from using this data in the current acquisition of control indicators is without merit and should be denied.

Alternatively, the agency argues that ATD waived its right to assert wrongful disclosure of data in the T.O. because it acquiesced in the prior use of this data. WRALC states in its report that the previous procurement for these items, RFP F09603-86-R-3537, which was awarded to ATD under contract F09603-87-R-C-4708, contained an AFLC/AFSC Form 2 similar to the one included in the current solicitation which not only referenced the same disputed T.O. data, but included the data as part of the solicitation package. Since this 1986 acquisition was not the subject of a protest by ATD, the agency takes the position that ATD is estopped from asserting that a similar use of the data in the 1987 acquisition was improper.

With regard to the remaining issue in the protest--whether WRALC violated ATD's claimed proprietary rights in WL31-054233 and DWG 23-055281--the agency maintains that (1) it

purchased unlimited rights to the data in WL31-054233 which was delivered under contract F09603-78-C-3561; and (2) that DWG23-055281 was simply referenced in AFLC/AFSC Form 2, but was not furnished to potential offerors; thus, no disclosure of data proprietary to ATD occurred.

In its comments on the agency report, ATD essentially repeats its prior disagreements with the agency's conclusions, and claims that there is no basis to conclude that ATD ever relinquished its proprietary interest in the data contained in the T.O. manual or wire list notwithstanding the unprotested 1986 acquisition for these items where the data was similarly used.

In considering protests involving allegations of wrongful disclosure of proprietary data, we have consistently stated that the protester bears the burden of proof on this matter and must show that the material submitted was marked proprietary or that the material was disclosed in confidence, that the preparation of the material involved significant time and expense, and that the material contained data or concepts that could not be independently obtained from publicly available literature or from common knowledge. See Strobe, Inc., B-220612, Jan. 28, 1986, 86-1 CPD ¶ 97 at 4, which cites John Baker Janitorial Services, Inc., B-201287, Apr. 1, 1981, 81-1 CPD ¶ 249.

Here, ATD concedes that the data contained in the T.O. was not marked as proprietary because, as a maintenance manual, it could not be marked with a restrictive legend. However, resolution of this protest ground centers on whether, pursuant to the Rights in Data and Computer Software clause, WRALC acquired the right to use the T.O. for other than installation, operation, maintenance or training purposes.

ATD construes the regulation at section 7-104.9(b)(1)(vii), as constituting a clear prohibition against use in procurement actions such as this since, in its view, the regulation does not expressly state that technical orders can be used for any purpose whatsoever. ATD believes that the agency's reliance on the definition in section 7-104.9(a)(7) is misplaced as it reads the language of section 7-104.9(b)(1)-(vii), as excepting the T.O.'s from disclosure "in any manner and for any purpose whatsoever."

WRALC responds that this regulation should not be construed so narrowly. The agency argues that, when read together, sections 7-104.9(a)(7) and 7-104.9(b)(1)(vii) clearly permit use of technical data in "manuals or instructional materials" in any manner and for any purpose. The agency thus maintains that the contracting officer properly

included the reference to the T.O. data in the current acquisition of control indicators.

We have read the provisions of the regulation in question and we are of the opinion that WRALC's interpretation of the DAR clause is reasonable. As detailed above, the regulation's definition of unlimited rights is reasonably descriptive such that we find there are no restrictions on the government's use of technical data contained in maintenance manuals. We believe the words "for installation, operation, maintenance or training" refer to how or under what circumstances the manuals are acquired and not how or in what way they may be used. Since the parties both concede that the manuals could not, and were not, delivered with a restrictive legend the government acquired unlimited rights as defined by the DAR provision to use this data in any manner whatsoever. Consequently, in referencing the disputed T.O. pages in the current solicitation, WRALC did not wrongfully disclose data proprietary to ATD. See 52 Comp. Gen. 773, at 777 (1973). Moreover, we need not address the protester's allegation that DWG 23-055281 is a schematic included in the T.O. on page F0-1 since any limitation marked on DWG 23-055281 has no effect because it is inconsistent with the DAR clause.

In addition, we think there is merit to the agency's position that ATD waived its objection by not protesting the inclusion of allegedly proprietary information in a prior solicitation. See Porta Power Pak, Inc., B-196218, Apr. 29, 1980, 80-1 CPD ¶ 305. We are not persuaded by the protester's argument that its failure to protest should be excused because it then was engaged in discussions with the Air Force on the issue concerning a procurement under which it was the eventual awardee.

As the allegation that ATD's proprietary rights in WL31-054233 were violated WRALC denies that it acquired this wire list on a limited rights basis. The Air Force has provided us with a March 31, 1981, letter concerning ATD's contract No. F90603-78-C-3561, in which the government asserted unlimited rights to "source control drawings" and rejected data supplied by ATD under the contract because the "documents" contained restrictive legends in violation of DAR § 7-104.9. Among the listed documents was "31-054233." ATD was directed to remove the restrictive legend and resubmit the documents. In its reply dated April 23, 1981, ATD responded that:

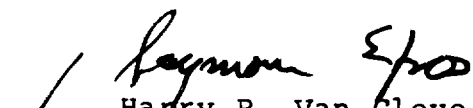
"The Corporate legends on the listed drawings were until 1980, pre-printed concurrently . . . .  
Negatives will be redone by blanking the offending legend and delivered within the next 30 days."

ATD's letter went on, however, to identify four drawings which it believed did contain the "appropriate DAR legend." No document numbered 31-054233 was included in this list of drawings marked with a restrictive legend. WRALC thus contends that ATD's April 23 letter acknowledged its "mistake" and promised corrective action forthwith; therefore, as resubmitted, WL31-054233 contained no restrictive legend in conformance with the provisions of contract C-3561.

ATD alleges that the document numbered "31-054233" identified in the government's March 13, 1981, letter was a "top assembly drawing that contained a so-called corporate legend" which the agency wanted removed, not wire list (WL) 31-054233, which is the subject of the present protest. The protester also asserts that the only "source control drawing" to which the government claimed unlimited rights in its March 13, 1981, letter was that bearing an entirely different number (46-018411). Thus, ATD argues, its April 23, 1981, response to the government's objections operated to remove the offending restrictive legend only as to "top assembly drawing" 31-054233 but not as to the wire list bearing the identical number.

Where, as here, the only evidence on an issue of fact is the conflicting statements of the protester and contracting officials, the protester has not met its burden of proving its case. See A.J. Fowler Corp., B-224156, Jan. 8, 1987, 87-1 CPD ¶ 33 at 5. Here, the only evidence on this disputed issue of fact about which the parties have equal knowledge are statements made by the protester that WL 31-054233 was not a document identified by the agency as improperly marked, which conflicts with the contracting official's statements. Although the protester has provided us with copies of these two documents bearing the same number and we have ascertained that they are indeed different, the protester has not met its burden of submitting sufficient evidence to prove that the document identified in the agency's letter of March 13, 1981, as "31-054233" was not the wire list of that number. Based on this record, we will not question WRALC's use of the document in question.

The protests are denied.

  
Harry R. Van Cleve  
General Counsel